

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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DEC -9 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0198-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CARLOS JOSE SOTO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20072722

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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B R A M M E R, Presiding Judge.

¶1 Carlos Soto petitions this court for review of the trial court's March 2, 2010 order denying in part his of-right petition for post-conviction relief filed pursuant to Rule

32, Ariz. R. Crim. P. We will not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In July 2007, Soto attacked B. as she was getting into her car, hitting her several times in the head with a handgun and taking her keys. Her son, A., heard B. screaming and came to assist her. Soto fired several shots at A. before fleeing. Soto pled guilty to armed robbery and two counts of aggravated assault with a deadly weapon. The trial court sentenced him to a presumptive, 10.5-year prison term for armed robbery and presumptive, 7.5-year prison terms for the aggravated assault convictions. The terms for aggravated assault were to be served concurrently to one another but consecutively to the armed robbery prison term.

¶3 Soto filed a petition for post-conviction relief, relying on *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989), and A.R.S. § 13-116 to assert the trial court had erred in ordering that his sentence for armed robbery and his sentence for assaulting B. be served consecutively. He additionally contended that, because “the aggravated assault involving [A.] is already running concurrently to [the sentence for assaulting B.], all three sentences must run concurrently.” The court granted partial relief, determining the prison terms for armed robbery and aggravated assault of B. should be served concurrently. It determined, however, that the prison term for Soto’s assault on A. should remain

consecutive to Soto's other terms. The court therefore vacated Soto's sentence and "remanded [the case] so that [Soto] can be resentenced accordingly."¹

¶4 On review, Soto argues that *Gordon* and § 13-116 require all his sentences to be served concurrently because his crimes constitute a single act. We observe that Soto did not raise this precise argument below; he asserted only that his sentence for aggravated assault of A. should remain concurrent with his sentence for assaulting B., without explanation or citation to authority. But, because the court, in rejecting that claim, apparently considered whether Soto's three offenses constituted a single act, we will address Soto's claim on review.

¶5 Section 13-116 prohibits consecutive sentences for multiple crimes arising out of a single act. See *State v. Siddle*, 202 Ariz. 512, ¶¶ 16-17, 47 P.3d 1150, 1155 (App. 2002). In *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211, our supreme court defined a three-part test to determine whether a defendant's conduct constituted a single act:

[We] consider[] the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under

¹It is not entirely clear from the record why the trial court remanded the case for resentencing when it had the authority to resentence Soto at the time it ruled on his petition for post-conviction relief.

A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

¶6 The ultimate charge here was armed robbery; it was the impetus for Soto's assaults and was the crime for which Soto received the longest sentence. Applying the first part of the *Gordon* analysis, Soto asserts the facts necessary to convict for armed robbery are his "assault together with forceable taking the car keys from [B]." He is mistaken. The facts necessary to convict for armed robbery are that Soto threatened or used force to take B.'s property against her will while using, threatening to use, or being armed with a deadly weapon. A.R.S. §§ 13-1902(A), 13-1904(A). Subtracting those facts from the evidence we are left with the fact that Soto fired a gun at A., plainly constituting aggravated assault. A.R.S. §§ 13-1203(A), 13-1204(A).

¶7 Soto apparently conflates the second and third parts of the *Gordon* analysis, arguing the second part supports a concurrent sentence because his conduct "expos[ed] [A.] to the same risk in committing the aggravated assaults and armed robbery" because he used a gun to commit both crimes. The degree or type of risk is not relevant to the second part of the *Gordon* analysis. We instead evaluate whether it was factually impossible for Soto to have committed robbery of B. without committing aggravated assault on A. That clearly is not the case. Soto had completed his armed robbery of B. before firing his gun at A. Because the first two *Gordon* factors permit the imposition of consecutive sentences, we therefore need not address the third factor, *see State v.*

Boldrey, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993), and conclude the trial court correctly determined that Soto’s prison term for aggravated assault on A. could be served consecutively to his other prison terms.

¶8 Although we grant Soto’s petition for review, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge